IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 782 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAMANTBHAI MAYABHAI KOLI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR UI VYAS for Appellant(s) : 1,
Mr.P.D.Bhate, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 08/05/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE SHARAD D.DAVE)

1. The present appeal is directed against the

judgment and order dated 15.7.2000 delivered by the learned Additional Sessions Judge, Bhavnagar, Camp at Mahua in Sessions Case No.55 of 1999, whereby learned Additional Sessions Judge convicted the appellant for the offence punishable under Section 302 of Indian Penal Code and sentenced him to undergo imprisonment for life and fine of Rs.10,000/-, in default, simple imprisonment for one year.

2. The case of the prosecution in brief is that on 9.3.99 at about 12.30 in the midnight when the accused was sleeping with his wife at their house, the accused expressed his wish to have sexual intercourse to which his wife – Baghuben refused. On hearing such refusal, the accused got enraged and hit his wife – Baghuben with an iron rod because of which his wife Baghuben died. Therefore, an offence came to be registered against the accused under Section 302 of the Indian Penal Code and under Section 135 of the Bombay Police Act.

3. The Investigating Officer, on completion of the investigation, submitted the chargesheet against the accused in the Court of learned J.M.F.C., Mahua. As the offence is triable by the Court of Sessions, the learned J.M.F.C., Mahua committed the case to the Sessions Court, Bhavnagar which was numbered as Sessions Case No.55 of 1999.

4. The charge against the accused was framed to which the accused pleaded not guilty and claimed to be tried. Accordingly, the learned Sessions Judge

recorded the evidence on behalf of both the parties and after hearing the learned advocates for the parties, convicted and sentenced the accused as stated above against which the present appeal is filed.

5. Heard learned advocate Mr.U.I.Vyas for the appellant and Mr.P.D.Bhate, learned APP for the State.

6. It is submitted by learned advocate Mr.Vyas appearing for the appellant that in the present case, there is no eye witness. He submitted that the doctor who performed the postmortem has not been examined. However, it was the duty of the prosecution to secure the attendance of the doctor who had performed the postmortem and in absence thereof, learned Sessions Judge has committed serious error in convicting the present appellant for the offence under Section 302 of Indian Penal Code. He further submitted that even there is no evidence with regard to the cause of death and no blood stains were found on the rod for causing alleged three injuries. He further submitted that alleged three deep injuries could not have been caused by a rod. He, therefore, submitted that when the chain of circumstances is not completed and established beyond the reasonable doubt, learned Sessions Judge has committed serious error in convicting the appellant. In support of his submissions, Mr.Vyas has relied upon the decisions of this Court in the case of Babuji @ Mulsing Dhudaji V/s State of Gujarat, reported in 1991(2) GLR 850 and in the case of Uttam Sadda and another V/s State of

Punjab reported in 1993 Cri.L.J. Page 2597. He, therefore, requested to quash and set aside the impugned judgment and order delivered by the learned Sessions Judge.

7. On the other hand, learned APP Mr.Bhate has supported the judgment and order passed by the learned Additional Sessions Judge and has submitted that in order to cause the death of the deceased, the appellant has caused the injuries by a rod and said injury is corroborated the medical evidence i.e., postmortem note. He, therefore, requested this Court that considering over all facts and circumstances of the case, this Court may not interfere with the judgment and order of conviction delivered by the learned Additional Sessions Judge.

8. That the learned Additional Sessions Judge, after appreciating the evidence on record and having heard the learned advocates for the parties has come to the conclusion that the case of the prosecution is proved beyond reasonable doubt and, therefore, learned Sessions Judge has recorded its finding in affirmative so far as issue nos.9.1 to 9.3 are concerned and held that the accused has inflicted the iron rod on the head of the deceased Baghuben with an intention to cause the death when the deceased refused to have sexual intercourse in the midnight on 9.3.1999 at 0.30 hours. It is required to be noted that the complainant and panch witnesses have turned hostile in the present case.

9. It can be noticed from the record of the case that no blood stains were found from the rod in

question by which the alleged three injuries have been caused by the accused appellant. It can also be noticed from the record that the doctor who had performed the postmortem of the deceased had not been examined by the prosecution and, therefore, in our view learned Sessions Judge has committed serious error in admitting the postmortem note without examining the doctor. It can also be noticed from the postmortem note Exh.31 that the deceased Baghuben died due to cardio respiratory arrest due to head injury and the allegation of the prosecution that the accused has inflicted the iron rod by which the deceased has sustained alleged three injuries which resulted into the death of the deceased is not supported by the medical evidence at Exh.40 as no blood stains were found on the rod in question. It is also to be noted that in the postmortem note at Exh.31, three injuries have been mentioned by the doctor who has performed the postmortem of the deceased and in absence of examination of the doctor who had performed the postmortem of the deceased, it cannot be said that the alleged injuries have been caused by the muddamal rod which admittedly does not contain blood stains on it. Under the aforesaid circumstances, we are of the considered opinion that the benefit of doubt is required to be given to the appellant accused.

9.1 We have no material to confirm the finding by the trial Court that the accused inflicted the blow with the rod. We have no material to infer or conclude whether the fatal injuries were possible with muddamal rod which is the prosecution case. This is on account of non-deposition by the Doctor

who performed the postmortem. There is no evidence to show that the injuries were sufficient in ordinary course of nature to cause death.

9.2 Since the case depends on circumstantial evidence, it is reasonable, safe and prudent to expect the prosecution to prove each circumstance by cogent and reliable evidence to connect the accused with offence. If any link is found to be missing on evidence, the benefit of doubt go to the accused.

10. We have also considered the decisions relied upon by the learned advocate appearing for the appellant accused. Having considered the above referred two judgments and in view of the aforesaid discussion, the appeal preferred by the appellant accused deserves to be allowed.

11. In the result, the appeal is allowed. The conviction and sentence awarded by the lower Court are set aside and the appellant be set at liberty if not required in any other case.

(A.L.Dave,J)

(Sharad D.Dave,J)

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